

No. 2960.

IN THE
United States Circuit Court of Appeals 5
FOR THE
NINTH CIRCUIT

PORTERVILLE CITRUS ASSOCIATION,

Appellant,

vs.

FRED STEBLER,

Appellee.

PETITION FOR REHEARING

FREDERICK S. LYON,
504 Merchants Trust Bldg.,
Los Angeles, Cal.,
Solicitor for Petitioner.

Filed this.....day of March, A. D. 1918.

F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

The James H. Barry Co., San Francisco.

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F. D. MONCKTON

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Appellee conceiving himself aggrieved by the decision herein rendered by this Honorable Court on February 11, 1918, comes now and respectfully petitions this Court for a rehearing and reargument of this cause upon each of the grounds and for each of the reasons hereinafter set forth.

1. The Court has entirely overlooked the fact that claim 11 of the patent in suit was allowed by the primary examiner of the patent office and was not involved in the appeal to the Board of Examiners-

in-chief of the patent office, referred to in the Court's opinion, and cannot therefore be held to be limited by the reasons of the decision of such board. Such claim 11 is not limited to the longitudinal extension of the distributing apparatus longer than the grader and the reasoning of the Court, deduced from such decision of such Board, does not and cannot apply to said claim 11.

Claim 11 was allowed by the action of Oct. 30, 1908, "Paper No. 3." Transcript, pages 589-590. It was never rejected nor was it limited by amendment.

Conceding the validity of this claim, it is clearly infringed. Furthermore there is nothing in the prior art to anticipate *the combination* covered by this claim. This claim calls for the combination of:

1. A fruit grading element,
2. A series of bins,
 - (a) The walls of the bins being adjustable longitudinally of the series,
3. A distributing apparatus comprising:
 - (a) A conveyor traveling longitudinally between the fruit grading element and the bins,
 - (b) Guide means arranged along the conveyor and forming chutes for guiding the fruit from said conveyor to said bins, said guide

means being adjustable to shift the longitudinal position of their outer ends in accordance with the longitudinal positions of the walls of the bins.

The idea of adjusting the bin partitions and also adjusting the point of delivery from the chutes, formed by the guiding means and the belt, to correspond with the adjustment of the bin partitions, so as to use either wide or narrow bins, as required by the run of sizes of the fruit, was entirely new and novel. It had never been utilized before Mr. Stebler's invention. The Thomas Strain patent *does not* show this adjustment of the bin partitions and *does not even hint* at the beneficial results thus to be obtained. This was a new interdependent relation first conceived by and first used by appellant. Its utility is conceded. It is proven by the fact that every machine put out by appellant since the invention has embodied it. Every machine put out by Mr. Parker (the manufacturer of defendant's machines) since the decision of this Court in 205 Fed., 735, has embodied it.

2. In the opinion in this case the Court says:

"The adjustability of the bins by the use of movable partitions called for by claims 11 and 19 was old in the art, and was used in various forms in prior combinations, and was not susceptible of monopoly by Stebler."

The Court's attention is called to the fact that there is no evidence to support such a finding that "the

adjustability of the bins by the use of movable partitions . . . was old in the art." Fixed bins were old in the so-called "Camel-back" installations. Fixed bins were old in the Thomas Strain patent. But movability of the bin partitions and corresponding adjustment of the delivery from the distributing apparatus were *both* novel.

This is one of the facts found by the lower Court. So far as its findings of fact rest on oral evidence of witnesses in open court its findings are conclusive.

Adamson v. Gilliland, 242 U. S., 350, 353;
Central Cal. Can. Co. v. Dunkley Co., decided
 October 1, 1917, by this Court, case 2915.

Not only was this novel *per se* but *the combination* expressed by claim 11 was novel. Never before had adjustment by bin partitions and corresponding adjustment of delivery points been attempted or used.

3. The Thomas Strain patent shows only a combination of *fixed bins* and adjustment of delivery *within the range of the given* fixed bin. The inventive idea of an interrelated adjustment of delivery and of the bins so that *both delivery and location of bins* as required by the operator can be secured, was neither disclosed or even hinted at in Thomas Strain's invention or in his patent.

4. The finding of the Court's opinion that with this Thomas Strain device "fruit which normally

would go to a bin *could be carried on to an adjacent bin*" is not supported by anything in the Strain patent. On the contrary is disproven thereby. If the Court refers to oral evidence, the most that can be said against appellant is it was in conflict and such conflict was decided by the Judge who saw the witnesses. His conclusions are conclusive.

Adamson v. Gilliland (supra).

This error that the brackets of the Thomas Strain patent can be so adjusted "*To vary the delivery from one bin into an adjacent bin*" seems to form so fundamental a part of the Court's conclusions that it is readily seen error as to this finding renders the Court's whole conclusions erroneous. And *error it is to suppose the Thomas Strain* conception will admit of such a use as "to vary the delivery from one bin into an adjacent bin."

With this very apparent error of mechanical fact before the Court it must be seen that if corrected the whole fabric of the Court's opinion is rendered unstable.

To do justice and equity a rehearing and reargument should be allowed and this erroneous finding corrected.

FREDERICK S. LYON,
Solicitor for Appellee.

I hereby certify that I have examined the foregoing petition and that in my opinion said petition is well founded; that it is not interposed for delay but in good faith.

FREDERICK S. LYON,
Solicitor for Appellee.